Supreme Court, U. S.
FILED
NOV 29 1976
MICHAEL RODAK, JR., CLERK

No. 76-704

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD DENNIS YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. On petitioner's motion, the district court set aside the conviction and awarded petitioner a new trial after one of petitioner's co-defendants gave testimony tending to exculpate petitioner (Pet. App. A, p. 1). A second trial ended in a mistrial when the jury, after two days of deliberation, was unable to reach a verdict; the mistrial was declared without any objection by petitioner (*id.* at 2).

Petitioner then moved to dismiss the indictment, claiming that another trial would violate the Double Jeopardy Clause. The district court denied this motion, and petitioner appealed. The court of appeals dismissed the appeal, concluding that a district court's rejection of a

double jeopardy claim is not reviewable by appeal except on review of a final judgment of conviction (Pet. App. A, pp. 1-7). Petitioner argues that the court of appeals should have disposed of his appeal on the merits.

The question presented by the petition in this case is identical to a question this Court will consider in *Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976. We ordinarily would request the Court to hold this case pending its decision in *Abney* and to dispose of this petition as appropriate in light of that decision.[1] We believe, however, that in this case the Court should exercise its discretion to deny the petition forthwith, despite the identity of the issues presented.

The first trial in this case took place in 1974, and the second ended in a mistrial on August 4, 1975 (Pet. 10-11). The court of appeals did not dismiss the appeal until October 19, 1976. There has already been lengthy delay in this case, and additional delay would be inconsistent with the need for the prompt resolution of criminal cases. Even if the Court were to disagree with our submission in *Abney* and hold that courts of appeals have jurisdiction over interlocutory appeals from denials of double jeopardy claims, petitioner could not benefit from that holding. Petitioner's argument that the Double Jeopardy Clause bars another trial after a mistrial has been declared because of jury disagreement — where, as here, the jury had deliberated for two days and there was no objection to the declaration of a mistrial — is frivolous. See *United States* v. *Perez*, 9 Wheat. 579, 580; *United States* v. *Sanford*, No. 75-1867, decided October 12, 1976. A decision by the court of appeals on the merits of

[1]We have furnished to counsel for petitioner a copy of our brief in *Abney*.

petitioner's arguments therefore would avail him nothing, yet it would produce still more delay in a case that has experienced too much delay already. We therefore request the Court to deny the petition for a writ of certiorari so that petitioner's trial, which is plainly not barred by double jeopardy principles, may go forward promptly.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.